

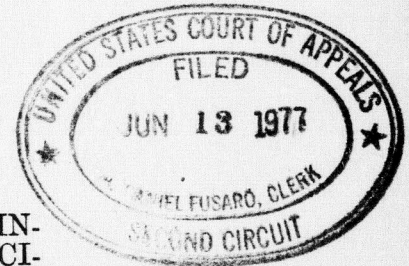
***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-6092

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT



SNEAKER CIRCUS, INC., BLAZER SPORTS INTERNATIONAL, INC., and BOB WOLF ASSOCIATES, INC.,

Plaintiffs-Appellants,

—against—

JIMMY CARTER, President of the United States, ROBERT S. STRAUSS, Special Representative for Trade Negotiations, STEPHEN J. LANDE, Deputy Special Representative for Trade Negotiations, and UNITED STATES INTERNATIONAL TRADE COMMISSION,

Defendants-Appellees.

On Appeal From the United States District Court For the Eastern District of New York

BRIEF FOR PLAINTIFFS-APPELLANTS

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Court For the Eastern District of
New York

BRIEF FOR PLAINTIFFS-APPELLANTS

THE ISSUE PRESENTED FOR REVIEW

1. Does the United States District Court have subject
matter jurisdiction over this action?

STATEMENT OF NATURE OF THE CASE

Plaintiff-Appellants (Appellants) commenced this action in the United States District Court for the Eastern District of New York for declaratory relief and a permanent injunction against Defendant-Appellees (Appellees) restraining them from entering into certain proposed agreements with the Republics of China and Korea under the authority of the Trade Act of 1974, 19 USC §2101 et. seq., (hereinafter referred to as the Trade Act), imposing absolute quotas on the exportation from China and Korea of certain types of non-rubber footwear. The action was commenced by the filing on June 2, 1977 of a summons and complaint, and an order to show cause with supporting affidavits* seeking a temporary restraining order and a preliminary injunction preventing the United States from entering into the said agreements.

The complaint asserts jurisdiction under 28 USC §§1331, 1337, 2201, 1346 and 15 USC §15. In addition, jurisdiction is asserted under the Administrative Procedure Act 5 USC §§701-706.

The amended complaint contains three counts. The first of which asserts that the Trade Act, the basis on which Appellees

* The order to show cause and affidavits were submitted by Appellants for filing and were before the Court below at all times in this action. Apparently, at the time of the preparation of this brief, they were not filed by the Court.

found their authority to make the agreements, was not complied with and that therefore the acts of Appellees thereunder and the intended agreements are invalid, unconstitutional and null and void. The contention here is that the International Trade Commission (ITC) failed to make a proper determination of good cause based on evidence as required by §2251(e) of the Trade Act, as a threshold for instituting a re-investigation of the same subject matter within one year and that the ITC failed to hold hearings, give notice thereof and interested parties an opportunity to be heard in connection with this threshold issue. It is also alleged that the President failed to issue a proper determination within sixty (60) days of the ITC report and failed to take into account specified considerations, all as required by the Trade Act.

The second count contends that the proposed agreements imposing foreign trade restraints, if not entered into under the authority of the Trade Act, are violative of §1 of the Sherman Act (15 USC §1) as a restraint of foreign and interstate commerce.

The third count asserts that the proposed agreements would be in violation of the General Agreement on Tariffs and Trade, a multilateral agreement entered into by the United States

with many nations including Korea, and in violation of the Treaty of Friendship, Commerce and Navigation entered into between the United States and the Republic of Korea in that the proposed import quotas would discriminate against the Republic of Korea in a manner repugnant to the provisions of that multilateral agreement and that treaty.

FACTS

The order to show cause submitted for filing at the time of the commencement of this action, contained an application for a temporary restraining order and an injunction (11)*. The determination of the Court below is predicated on its finding that the Customs Court has jurisdiction over this action (4-10).

On June 2nd, the time of the filing of this action, and the first hearing before the District Court, it directed the United States Attorney to produce the diplomatic notes which were then conceded by the Government to have been exchanged between the U.S. and the Republics of China and Korea embodying the understandings which would become the agreements between these Governments imposing import quotas. The Court limited its direction to an "in camera" inspection of these documents on the basis of the Government's claim that they were classified and privileged. At the time Appellants made no objection to that claim and, accordingly when the documents were produced, Appellants were not made privy to them. The documents were produced at the time of the second hearing on June 7th in an in camera inspection. The Court announced that it had examined these documents and that they indicated that the agreements would be entered into between the United

*References in parenthesis are to pages in the Appendix.

States and the Republics of China and Korea imposing the quotas described above. At the same hearing, the United States Attorney advised the Court that the agreements were to be entered into imminently. This squared with the information obtained indirectly by Appellants through newspaper ads and the like. See e.g. Exhibit G to the Appellants' order to show cause (71).

The instigation giving rise to the first hearing was Appellants' application by order to show cause for the temporary restraining order and the preliminary injunction. Appellants presented this application at both hearings.

The issue of subject matter jurisdiction was raised in the memorandum submitted to the Court by the United States Attorney just prior to the second hearing. No formal motion to dismiss on this ground or on any other grounds was ever made by Appellees. At this same hearing, pursuant to the Court's direction, argument was heard only on the single issue of subject matter jurisdiction and additional memoranda on this issue were served and filed the following day. The Court handed down its decision late in the afternoon on Friday, June 10th.

The information of the Appellants (20,21,23,70-71), not contested by the Government, and apparently clear in the

diplomatic notes examined by the Court, is that the agreements will be implemented by the Governments of China and Korea. In short, the quotas will be effectuated by the Governments of China and Korea reducing their exports of the subject merchandise to the United States in such quantities as not to exceed the quota. As so implemented, merchandise in excess of quota limitations will never arrive in the United States and action with respect thereto will never be taken by the United States Customs Service.

The substantive facts underlying this action are as follows:

On October 5, 1976, the ITC initiated a re-investigation of the footwear industry to determine if there was substantial injury to the domestic industry from the importation of footwear and to report and make recommendations to the President respecting its findings. The re-investigation was commenced pursuant to request by the Senate Finance Committee. Prior to October 5th, interested parties requested the ITC to hold public hearings on the question of whether good cause existed permitting the ITC to re-investigate the same subject matter as it had previously, and within a one year period. The ITC did not respond to these requests, did not hold public hearings, gave no notice, and did not permit interested parties an opportunity to be heard. On October 5, 1976, the ITC held a meeting at

which it determined that good cause existed. No evidence was presented on the issue of good cause and the minutes of the ITC hearing show that no such evidence was before that body on this issue (16,17,73-77).

Thereafter, interested parties renewed their request for hearings and an opportunity to submit evidence on the question of good cause, but the ITC refused these requests. The ITC then conducted an investigation and hearing on the issue of whether the subject footwear imported in the U.S. was a substantial cause of serious injury to the domestic industry under 19 USC §2251 et seq. of the Trade Act. A report to the President was issued on February 8, 1977 containing a finding that such injury existed and recommended the imposition of a tariff-rate quota system imposing increased duties on amounts imported above quota levels. On April 1, 1977, the President made a determination rejecting the recommendations of the ITC and proclaiming import relief by directing his Special Representative for Trade Negotiations to enter into negotiations with "the appropriate foreign exporting countries" and to make agreements pursuant thereto (18-20,56).

The proposed agreements relate only to the Republics of China and Korea and they impose absolute quotas on exports of the subject footwear therefrom (20,21,23). This is nowhere disputed by the Government.

POINT I.

THE DISTRICT COURT HAS JURISDICTION
OVER THIS ACTION.

A. THE CUSTOMS COURT IS NOT AVAILABLE
TO THE APPELLANTS IN THIS ACTION.

If arguendo, jurisdiction of this action is conferred upon the Customs Court pursuant to 28 U.S.C. 1582(a) (4), the jurisdiction may only be invoked, in this case, by the filing of a protest pursuant to 19 U.S.C. §1514(a) (4). The protest may not be filed until there is a decision of a Customs officer excluding merchandise from entry into the United States.

The jurisdiction of the Customs Court is specifically circumscribed by 28 U.S.C. § 1582(c), which provides:

"(c) The Customs Court shall not have jurisdiction of an action unless (1) either a protest has been filed, as prescribed by section 514 of the Tariff Act of 1930, as amended, and denied in accordance with the provisions of section 515 of the Tariff Act of 1930, as amended, or if the action relates to a decision under section 516 of the Tariff Act of 1930, as amended, all remedies prescribed therein have been exhausted, and (2) except in the case of an action relating to a decision under section 516 of the Tariff Act of 1930, as amended, all liquidated duties, charges or exactions have been paid at the time the action is filed."

This action is not an action in which a protest has been filed. Nor does it relate to a decision under § 516 of the Tariff Act of 1930 as prescribed in subsection (c) above. Appellants seek to invalidate certain acts and determinations

of the ITC, the President and the Special Representative for Trade Negotiations and to enjoin the making of agreements imposing quotas by way of voluntary restraints on the part of the governments of the Republics of China and Korea. The relief requested is directed prospectively to the making of the international agreements. If the agreements are made, the footwear subject thereto, above quota levels, will never arrive in the United States. The restraints will take place in the foreign nations at point of export and will be imposed by the governments of these nations themselves.

J. C. Penney Co. v. U. S. Treasury Dept., 439 F. 2d 63 (2nd Cir. 1971), is not dispositive. This Court determined that the Customs Court, and not the District Court, had jurisdiction to determine issues as to the constitutionality of an investigation by the Treasury Department instituted under the Anti-dumping Act, 19 U.S.C. §§ 160 et seq., notwithstanding that no protest had been filed respecting the imposition of anti-dumping duties on the imported merchandise. This Court, in effect, found that the couching of the suit in terms of declaratory and injunctive relief, and the constitutional issue, did not permit the District Court to oust the Customs Court from its normal jurisdiction under the Anti-dumping Act.

Fundamental, however, to the decision in Penney is that the merchandise subject to the duties there would, of necessity, if the duties were to be imposed, arrive in United States ports, be subject to Customs Service action, and thereby

permit the filing of protests pursuant to 19 U.S.C. § 1514(a) (4). Thus, the plaintiff in Penney had available to him the remedy of protest to the Bureau of Customs which is preliminary to invoking the jurisdiction of the Customs Court upon the imposition by the Bureau of a dumping duty based upon the dumping findings of the Treasury Department.

In the case at bar, if the import restricts are imposed, as they will be in the normal course of events if the agreements are signed, the subject merchandise will in fact never arrive at United States ports. Even assuming that protest procedure would be available if the voluntary restrictions were to be monitored in the United States, it is clearly an integral part of the proposed agreements that the merchandise subject to the quotas will not arrive in this country and, no opportunity for protest will be available to appellants. This is not an assumption; it is fact, based upon the provisions of the proposed agreements. While the Court below refers to speculation respecting the non-availability of protest procedure, it is submitted that the only valid speculation is the extremely remote one that the foreign governments will breach the agreements with the United States.

Appellants' action is governed by the rule in Timken Co. v. Simon, 539 F. 2d 221 (D.C. Cir. 1976) which, like Penney was decided under the provisions of the Anti-dumping Act. The Court found that no remedy was available under the statutorily prescribed review procedure in the Customs Court, and that the action of the Secretary of the Treasury objected to by the

plaintiff was properly reviewable in the District Court through an action for declaratory and injunctive relief. In Timken, the Secretary of the Treasury delayed publishing the anti-dumping finding as required by the statute, thereby permitting entry of merchandise free from the imposition of anti-dumping duties until publication. The Court found that the prescribed review procedure under the Anti-dumping Act applied prospectively so far as the imposition of the "increased duties and could not reach merchandise entering prior to publication. Accordingly, the Court stated (at p. 226 of 539 F. 2d):

"As outlined above, it is clear that section 516 subjects to Customs Court review only certain entries that occur after the date of the Secretary's adverse ruling on an American manufacturer's section 516 petition. The entries at issue in this case have already taken place, and nothing in section 516 can get them before the Customs Court... The question presented in this action is simply a question outside the scope of section 516." (Emphasis ours).

There being no relief available in Customs Court, the Court in Timken readily held that jurisdiction was properly fixed in the District Court. The Court underscored the rationale for its rule in footnote 7, on page 226 of 539 F. 2d as follows:

"More on point in our view, are those cases, indicating that the federal district courts can assert jurisdiction, under appropriate jurisdictional grants, over customs-related matters in which no adequate remedy exists in the Customs Court. See, e.g., J.C. Penney Co. v. Department of the Treasury, supra, 439 F. 2d at 68; United States v. Hammond Lead Products, 440 F. 2d 1024; 58 C.C.P.A. 129, cert. denied, 404 U.S. 1005, 92 S. Ct. 565, 30 L. Ed. 2d 558 (1971); cf. Waite v. Macy, 246 U. S. 606, 38 S. Ct. 395, 62 L. Ed. 892 (1918); Cottman Co. v. Dailey, 94 F. 2d 85, 89 (4th Cir. 1938). Since Timken has no remedy pursuant to section 516 in the Customs Court, we

decline to hold that the District Court lacked jurisdiction over this action."

The reference of the Tirken Court to the Penney decision in the foregoing quote points up the recognition of this Court in Penney of the proposition that the District Court will entertain jurisdiction, even in customs related matters, where the Customs Court is not available to the plaintiff.

In this light, Consumers Union etc. v. Committee for the Implementation of Textile Agreements, slip op. (D.C. 1977) cited by the Court below is also inapposite. The case involved the "...administration of the United States program regulating by quota the importation of textiles..." under the Agriculture Act (7 U.S.C. § 1854). Under that statute the defendant Committee supervised "...the implementation of a textile import quota program, including the setting of quotas..." The plaintiff's attack was based on the assertion that the Committee failed to make certain requisite determinations. Thus, it is clear that Consumers Union v. Committee relates to the implementation and administration in the United States by the Committee of a quota program. The restraints are imposed in the United States. Unlike the instant action, the opportunity for protest and invocation of Customs Court procedures and remedies were clearly available.

The situation at bar is precisely the same as was involved in Consumers Union v. Kissinger, 506 F. 2d 136 (D.C. Cir. 1974) where the restraints were imposed through voluntary

agreements which were to be enforced in foreign countries. The voluntary quotas could not be implemented by the Customs Service. There could never have been a decision by a Customs official upholding the restraint and opening up the protest procedure invoking § 1582 and affording jurisdiction to the Customs Court. Accordingly, in Kissinger jurisdiction was properly entertained in the District Court. Indeed, Consumers Union v. Committee affirms this proposition by explicitly distinguishing Kissinger as follows (at p. 5 of slip op):

"But in that case, (referring to Kissinger), 'the voluntary import restraint undertakings' were not legally binding and could not be implemented by the Customs Service... There could, as a result, never have been a decision by a Customs official upholding the restraint and opening up the protest procedure which affords access to the Customs Court. Here, however, if anyone wishes to challenge the Committee's action, he can do so as other challenges of that nature are made, i.e. as an importer or as an American manufacturer, producer or wholesaler, bringing textiles into the United States." (Emphasis ours).

The rationale in favor of District Court jurisdiction is all the more applicable in the instant action, since the non-binding agreements in Kissinger were between the United States and private foreign steel companies, not their governments, and therefore presumably, less prone to effective policing and more to breach, than in this action.

The Court below reasoned that appellants "...assume that no goods in excess of the quotas will be shipped to the

United States, and that therefore no decision of a Customs official excluding goods will have to be made" (p. 4). It is urged that this is no assumption, it is a reality which will necessarily flow from the signing of the agreements. As in any action for declaratory and injunctive relief, this one seeks prospectively to avoid damage. Its ripeness exists now by virtue of the conceded imminent signing of the restraint agreements. It will never be ripe for Customs Court inasmuch as the jurisdiction of that Court cannot now, or at any future time, be invoked procedurally.

If protest procedure is unavailable, Customs Court jurisdiction cannot exist U.S. v. Hammond Lead Products 440 F. 2d. 1024 (C.C.P.A., 1971). In National Milk Producers Federation v. Schultz, 372 F. Supp. 745 (D.C. 1974) the Court stated: (at p. 746 of 372 F. Supp.):

"The plain effect of Hammond Lead is to foreclose protests regarding countervailing import duties by American manufacturers pursuant to administrative procedures set forth in the 1930 Tariff Act. As a consequence, the statutory grant of exclusive jurisdiction conferred upon the Customs Court by 28 U.S.C. § 1582 is inoperative as its activation requires a 'protest pursuant to the Tariff Act of 1930' which is unavailable to plaintiffs. Since § 1582 is the only statutory grant of jurisdiction to the Customs Court respecting review of import charges, its unavailability acts to confer original jurisdiction upon this court under 28 U.S.C. § 1340." (Emphasis ours).

The absence of a forum is not a temporary matter here as in Penney, where the imposition of the anti-dumping duties would of necessity occur. It is not a matter, as in Penney, of maturation while the Government takes the necessary steps preliminary to imposing the duties. Here, the

United States Government action effecting the damage of appellants will occur on the signing of the agreements and without action in the United States by Customs officials. On this basis, the District Court and not the Customs Court has jurisdiction over this action.

B. EVEN APART FROM THE FACTUAL UNAVAILABILITY OF CUSTOMS COURT JURISDICTION DISCUSSED ABOVE, THE DISTRICT COURT HAS JURISDICTION OVER THIS ACTION.

Jurisdiction in the instant case is asserted under 28 U.S.C. §§ 1331, 1337, 2201 and 1346 (with respect to all three counts in the complaint) and 15 U.S.C. § 15 (with respect to the second count asserting the anti-trust violation). In addition, jurisdiction is asserted under 5 U.S.C. §§ 701-706, the Administrative Procedure Act. See Timken Co. v. Simon, supra, footnote 7 wherein it is stated (at p. 226 of 539 F. 2d):

"We have no doubt that the District Court had jurisdiction, especially pursuant to either the mandamus statute or the Administrative Procedure Act, to entertain an action to require the Secretary to perform statutory duties of a ministerial nature. See Haneke v. Secretary of HEW, 535 F. 2d 1291, 1294, 1296 (D.C. Cir. 1976). And we note in this regard that, other than its arguments concerning exclusive Customs Court jurisdiction and implied statutory preclusion of judicial review, infra, the Government does not challenge the jurisdiction of the District Court to entertain this action."

The issues in this action arise under the Trade Act of 1974, questions respecting anti-dumping and countervailing duties as in Penney, supra, and Consumer Union v. Committee, supra, fall within the purview of the Tariff Act of 1930. They are therefore, explicitly cognizable in Customs Court and

subject to protest procedure. See 28 U.S.C. 1582(c) and 19 U.S.C. §§ 1514-1516. This is not so respecting issues arising under the Trade Act, which structurally is not part of the Tariff Act of 1930 and which, more importantly, deals not with narrower customs' duties administration questions, but with broader questions including the power of the executive branch to make international agreements effecting and promoting foreign trade. The nature of the questions arising under this latter statute are essentially different than those arising under the Trade Act, which are more readily adaptable to treatment in the District Court.

In other terms, the nature of this action is that it is not customs-related. It is, in the issues it raises, similar to Consumers Union v. Kissinger, supra, involving the question of the validity of presidential agreements imposing foreign trade quotas apart from the authority of any statute. As noted above, the Court there never questioned that the District Court properly exercised jurisdiction. No issue was raised in that action, that it was appropriately cognizable in Customs Court; it was not a customs-related matter; it did not arise under the Customs' laws. The courts have refrained from finding Customs Court jurisdiction, where the nature of the action did not present issues expressly cognizable in that Court or where the protest procedure was not made expressly available. U.S. v. Hammond Lead Products, Inc. supra; National Milk Producers Federation v. Shultz, supra. In these cases, decided

prior to the amendment of § 1582, which made suits arising under the countervailing duties and anti-dumping section of the Tariff Act of 1930 explicitly cognizable in Customs Court and which, by virtue of §§ 514-516, were made expressly subject to protest procedure, Customs Court jurisdiction was rejected.

This Court in the Penney case recognized that certain customs-related matters, e.g., suits challenging the Customs Collector's exclusion from entry of goods simulating the trademark of an American manufacturer, and suits challenging the Collector's exclusion of imported knives, were not subject to Customs Court jurisdiction on the grounds that the applicable statutes were "not a part of the Customs' Laws". This result obtained notwithstanding that the exclusion in both situations was by action of the Collector of Customs. It is urged that it is all the more clear in this action, where there has not been nor will there be related action by Customs officials, that it does not "arise under the Customs' Laws".

Further, only the District Court has the power to impose the appropriate relief required in this action. Unlike Penney where plaintiff urged the greater effectiveness of the equitable relief affordable in the District Court over the piecemeal refund of excess payments available in Customs Court, as a basis for asserting District Court jurisdiction, in this action there is no remedy available in Customs Court. Here, the harm to be remedied is integral to the making of the agreements and, once those are made, the harm will necessarily and irremediably flow therefrom. Only equitable relief by way

of declaratory judgment and an injunction can remedy this and this relief is available only in the District Court.

CONCLUSION

For the reasons stated above, the order of the Court below should in all respects be reversed.

Respectfully submitted,

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